IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 119

WILLIAM J. MURRAY, III, INFANT, BY MADALYN E. MURRAY, HIS MOTHER AND NEXT FRIEND AND MADALYN E. MURRAY, INDIVIDUALLY,

Petitioners.

v.

JOHN N. CURLETT, PRESIDENT, SAMUEL EPSTEIN, MRS. M. RICHMOND FARRING, ELI FRANK, JR., DR. ROGER HOWELL, HENRY P. IRR, DR. WILLIAM D. McELROY, MRS. ELIZABETH MURPHY PHILLIPS, JOHN R. SHERWOOD, INDIVIDUALLY, AND CONSTITUTING THE BOARD OF SCHOOL COMMISSIONERS OF BALTIMORE CITY,

Respondents.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF OF RESPONDENTS

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BRIEF OF RESPONDENTS

OPINIONS BELOW

The opinions rendered in the courts below are as follows:

1. The Memorandum Opinion of the Superior Court of Baltimore City (Prendergast, J.) is not officially reported, but appears in the Record (R. 8).

2. The opinion of the Court of Appeals of Maryland is officially reported at 228 Md. 239 and 179 A. 2d 698. The opinion also appears in the Record (R. 26).

JURISDICTION

The jurisdiction of this Court is governed by 28 U.S.C., Section 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

This case involves:

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States.

2. The First Amendment to the Constitution of the United States.

3. Article 77, Sections 202 and 203 of the Annotated Code of Maryland (Michie, 1957).

4. Section 91 of the Charter and Public Local Laws of Baltimore City (Flack, 1949).

5. Article VI, Section 6 of the Rules of the Board of School Commissioners of Baltimore City, as amended November 17, 1960.

6. Article 77, Section 231 of the Annotated Code of Maryland (Michie, 1957).

All of the applicable portions of the foregoing are set forth verbatim in the Petitioners' Brief, at p. 4.

QUESTION PRESENTED

Does the use of the Lord's Prayer and readings from the Bible in opening exercises in the public schools where provision is made for excuse from attendance, constitute a

violation of the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution, as made applicable to the states by the Fourteenth Amendment?

STATEMENT OF THE CASE

In 1905, the Board of School Commissioners of Baltimore City (the "Board") adopted Article VI, Section 6 (the "Rule") under its rule-making powers pursuant to Article 77, Section 202 of the Annotated Code of Maryland. The Rule provides in effect for the use of the Bible and or the Lord's Prayer, without comment, during morning opening exercises.

The Petitioners requested and were granted a hearing before the Board, at which time they expressed their objection to compliance with the Rule and asked that it be rescinded. The Board sought the advice of the Attorney General of Maryland, who ruled that the practice in question was not unconstitutional, provided that the Rule be amended to allow objectors to be excused from attending the exercises. The Board amended the Rule accordingly on November 17, 1960. The infant petitioner was thereafter excused from attending the exercises, upon request by his mother.

On December 7, 1960, the Petitioners filed a Petition for a writ of mandamus in the Superior Court of Baltimore City, asking that the Board be commanded to rescind the Rule and to cause the challenged practice to be discontinued. The Respondents' demurrer was sustained by the Superior Court, without leave to amend. The Maryland Court of Appeals affirmed by a four-to-three decision.

A Petition for Certiorari was filed in this Court on May 15, 1962, and was granted on October 8, 1962 (R. 48).

SUMMARY OF ARGUMENT

I.

(a) The Establishment Clause "barrier" between Church and State is more of a graduated spectrum or range than a fixed absolute wall. The problem is one of degree. The considerations underlying the fixing of the dividing line between permitted state accommodation on the one hand and proscribed encroachment on the other must be applied anew in each fact situation as it arises.

(b) The Lord's Prayer and the Bible, while religious in origin and framework, are not used in the challenged opening exercises as a form of religious instruction or as a religious service. Rather, these materials are utilized as a source of inspirational appeal to inculcate moral and ethical precepts of value in a salutary and sobering exercise with which to begin the school day. Their use in such a traditional and significant role transcends their religious origins, and does not constitute a sufficient encroachment or impingement to abridge the Establishment Clause.

(c) The *Engel* decision held only that the composition of an official prayer by or for a state agency as part of a governmentally sponsored religious activity abridged the Establishment Clause. The Court disapproved of that degree of Church-State contact which would permit a state official to either compose a prayer for a use prohibited by the Establishment Clause, or to select a prayer composed by another for the same purpose. A contrary decision would have placed the Court in the position of a board of censors for every prayer so composed or selected by a state official.

The use of the Lord's Prayer and readings from the Bible constitute neither the composition nor the sanction-

ing of an "official prayer". Whereas the Regents' Prayer was an unadorned religious exercise, the challenged materials are utilized, not as an "official prayer", but rather as a vehicle whereby the desired level of moral, ethical and inspirational uplifting can be attained. The use of these established and traditional mainsprings of high moral value should not be denied to our public educators.

II.

An analysis of each type or element of alleged compulsion or coercion reveals that there is no infraction of the Free Exercise Clause. The right to be excused is adequate and ample protection. The affirmative action which is required of one who elects to excuse himself from the opening exercises does not constitute a requirement that he "profess a belief or disbelief in religion", but is simply the use of his Free Exercise Clause privilege.

A "reverse discrimination" would result if the dissenter, to protect his own scruples from offense, could require others to eliminate an activity deemed permissible under the Establishment Clause. While the First Amendment protects the non-believer with the same force as it protects the believer, it was never intended that such right of protection be extended to grant a preference to either.

Coercive pressures, if any, which may be generated by the disapproval of teachers and pupils are not cause for eradication of the opening exercises. The disapproval of others is always the burden of the nonconformist. His privilege of dissent is protected by the right to be excused from the exercises. To spare him the consequences of disapproval by eliminating the exercises, would be to prefer the dissenter over those who do not dissent.

III.

The consequences of a decision prohibiting the use of the Lord's Prayer and the Bible in opening exercises may be severe and far-reaching. If these exercises are deemed to bear sufficient elements of religiousness to fall within the proscribed Church-State area, it will become increasingly difficult, if not impossible, to maintain that many or all other forms of Church-State contact do not bear equally sufficient aspects of religiousness. Beyond the challenged exercises, the possible distinctions become extremely tenuous. From a legal and logical standpoint, the dividing line should be drawn here to halt the inevitable result of a steadily increasing erosion in a vulnerable area.

IV.

The traditional use of the challenged materials in morning opening exercises in our public schools has surpassed its religious beginnings and has taken its place as a significant element of our national heritage. The religious influences which saturate and enrich innumerable facets of our public and private life cannot be dissected and discarded without substantial harm to a vital component of our national being.

ARGUMENT

POINT I.

The Establishment Clause of the First Amendment Is Not Violated by the Opening Exercises Conducted in the Public Schools of Baltimore City.

(a) *The Question of Degree*

The constitutionality of the opening exercises in question must be measured against the Establishment Clause and the Free Exercise Clause of the First Amendment to the Constitution, both of which are operative in this case

by virtue of the Fourteenth Amendment. As noted by this Court in *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962), these two clauses have different applications in that they "forbid two quite different kinds of governmental encroachment upon religious freedom." 370 U.S. at 430.

We treat here first the Establishment Clause, putting aside for the moment the considerations presented by the Free Exercise Clause, where issues of coercion and compulsion play a far more decisive role.

The historical origins and background of the Establishment Clause have been thoroughly explored and reviewed in prior opinions of this Court. Another such reexamination here is accordingly deemed unnecessary. See, for example, the very concise but thorough survey in *Engel v. Vitale, supra*, 370 U.S. at 425-429. See also *Everson v. Board of Education*, 330 U.S. 1, 67 S. Ct. 504, 91 L. Ed. 711 (1947), at 330 U.S. 8-15; *Torcaso v. Watkins*, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961), at 367 U.S. 490-491.

Perhaps the most frequently quoted exposition of the broad meaning and interpretation accorded to the Establishment Clause by this Court is set forth in *Everson*, 330 U.S. at 15-16:

> "Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice

> religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' "

Petitioners here contend that the Establishment prohibition is an absolute one, citing *Torcaso v. Watkins, supra; West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), and *Engel v. Vitale, supra*. But a review and analysis of all the pertinent decisions, including those cited, clearly rebut this contention. The matter cannot be so simply put.

In *Everson, supra*, the Court upheld a school board rule authorizing reimbursement to parents of expenses incurred for the transportation of their children to school on public buses, including reimbursement in some cases for the cost of sending children to Catholic parochial schools. Speaking for the Court, Mr. Justice Black, after expressing the foregoing exposition of the law, held that the wall of separation between Church and State had not been breached within the meaning of that language. The Court noted its reluctance to strike down legislative action within a State's constitutional power "even though it approaches the verge of that power". 330 U.S. at 16.

McCollum v. Board of Education, 333 U.S. 203, 68 S. Ct. 461, 92 L. Ed. 649 (1948), rejected the Illinois "released time" program, where religious classes were conducted on school property by religious instructors during regular school hours. Nevertheless, Mr. Justice Frankfurter, in his concurring opinion, noted that:

> "This case, in the light of the *Everson* decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of

the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church'. But agreement, in the abstract, that the First Amendment was designed to erect a 'wall of separation between church and State,' does not preclude a clash of views as to what the wall separates. Involved is not only the Constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase." 333 U.S. at 212-213.

Again, at 333 U.S. 225, he stated that:

"Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some 'released time' classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that *close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court.*" (Emphasis added.)

This latter phrase approaches what we believe to be the proper judicial test, in its reference to the exact degree of interrelationship between the religious activity in question on the one hand and the public educational system on the other.

The same consideration is found again in *Zorach v. Clauson*, 343 U.S. 306, 72 S. Ct. 679, 96 L. Ed. 954 (1952), where the Court upheld the constitutionality of New York City's released time program, which permitted the release of students from public schools during the school day to attend classes in religious instruction at religious centers not on school property. In analyzing the scope of the First Amendment prohibition, the Court noted, through Mr. Justice Douglas (343 U.S. at 312):

> "The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter."

The essence of the issue is then most aptly stated, at 343 U.S. 314:

> "The constitutional standard is the separation of Church and State. *The problem, like many problems in constitutional law, is one of degree.*" (Emphasis added.)

That this is undoubtedly the case is reflected not only in the landmark decisions in this area (*Everson* and *Engel*; *McCollum* and *Zorach*), but in numerous other cases, as noted by Mr. Justice Reed in his dissenting opinion in *McCollum v. Board of Education*, *supra* (333 U.S. at 249):

> ". . . This explains the well-known fact that all churches receive 'aid' from government in the form of freedom from taxation. The *Everson* decision itself

> justified the transportation of children to church schools by New Jersey for safety reasons. It accords with *Cochran v. Louisiana State Board of Education*, 281 U.S. 370, where this Court upheld a free textbook statute of Louisiana against a charge that it aided private schools on the ground that the books were for the education of the children, not to aid religious schools. Likewise the National School Lunch Act aids all school children attending tax-exempt schools. In *Bradfield v. Roberts*, 175 U.S. 291, this Court held proper the payment of money by the Federal Government to build an addition to a hospital, chartered by individuals who were members of a Roman Catholic sisterhood, and operated under the auspices of the Roman Catholic Church. This was done over the objection that it aided the establishment of religion. While obviously in these instances the respective churches, in a certain sense, were aided, this Court has never held that such 'aid' was in violation of the First or Fourteenth Amendments."

Just as the *Everson* decision found no unconstitutional encroachment in a matter of general welfare legislation, the Court in *McGowan v. State of Maryland*, 366 U.S. 420; 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), similarly found no objectionable infringement in a legislative exercise of the police power.

It is respectfully submitted that the "absolute prohibition" of the Establishment Clause in actuality presents more of a graduated spectrum or range, than a fixed finite wall. The problem, as Mr. Justice Douglas notes in *Zorach*, is one of degree. The question in each case is where to draw the line — or, if you will, where to put the "wall". The considerations underlying such application of the dividing line between permitted state accommodation and proscribed impingement or encroachment, have been and

must continue to be applied anew in each fact situation as it arises.

(b) *The Nature of the Opening Exercises In Question*

Before the principles and protections afforded by the Establishment Clause may be applied to the challenged exercises, the nature and purpose of those exercises must be examined in some detail.

The Rule adopted by the Board of School Commissioners of Baltimore City provides, in effect, for the reading of a portion of the Bible and/or the recital of the Lord's Prayer, without comment, and makes provision for excuse. The crux of the Petitioners' contention is set forth best in the dissenting opinion below (*Murray v. Curlett*, 228 Md. 239, at 257-258):

> "There seems to be no substantial room for dispute that the reading of passages from the Bible and the recital of the Lord's Prayer are Christian religious exercises. This being so, the inclusion of such a reading or recital in the opening exercises of the public schools seems plainly to favor one religion and to do so against other religions and against non-believers in any religion."

We do not agree. We do not think that the use of the Lord's Prayer or the reading of the Bible to commence the school day can be characterized in so clear or simple a fashion. Rather, it is submitted that these exercises have assumed a role, through long usage and tradition, of a far different and more complex nature.

Of course, as recognized in *Engel*, a prayer by its very nature is a religious activity. But this factor alone is not determinative of the issue at hand. It was not determinative in *Everson* or *Zorach*, or in the other decisions noted

above. Nor was it determinative in *Engel* (as will be pursued at greater length, below).

Rather, the precise nature of the religious activity must be analyzed in considerable detail in each case to determine whether it has crossed the dividing line which marks off the area of permitted accommodation from that of proscribed encroachment, in the graduated spectrum of factual situations reflecting Church-State contact.

It is respectfully submitted that the opening exercises in question must be categorized as coming within the permitted range — the constitutional side of the line. These exercises, through long usage and tradition, have far transcended and outgrown their purely religious origins. They are not used in the school system as a religious rite, whether denominational or non-denominational. To the contrary, through long usage and gradual evolution of purpose, they have taken their place in our school system as a traditional mode of a sobering and morally beneficial exercise with which to begin the school day. They are used here, as they are used in opening the sessions of legislatures and courts, as a way to commence the day's events with a few moments of an inspirational moral uplifting.

It is thus our contention that the dominant purpose and effect of these exercises is not religious instruction, as in *McCollum*, nor the conduct of religious services, as in a place of worship. To the contrary, the pervading purpose and objective in such use of the Lord's Prayer and the Bible is the utilization of a source material for inculcation of moral and ethical precepts.

While at first inspection, these materials evidence and reflect their religious content and origin, a closer examination and analysis reveal that the elements of religiousness

play only a minute part in the underlying and motivating role of the opening exercises. It is the *inspirational appeal of religion* which is utilized here, not the teachings or dogma of any particular religion, or even that of religion in general. If there be any "aid" to religion here at all (and we contend there is not), it is extremely minimal in nature and degree.

The Bible is not merely a great religious work of a particular sect or religion, it is also a treasury of fundamental moral and ethical values. The Lord's Prayer is not merely a prayer to be recited in church as part of a religious service. In our society, the Lord's Prayer has, over the centuries, attained a far greater height and meaning. It has transcended its sectarian origin, and indeed its purely religious roots, and stands with the Bible as a great moral and inspirational work of high value.

Like the "Sunday blue laws" in *McGowan*, these opening exercises have assumed a stature in our educational system markedly and wholly apart from their religious beginnings. As stated by the New Jersey Court in *Doremus v. Board of Education*, 5 N.J. 435, 75 A. 2d 880, 888 (1950), appeal dismissed 342 U.S. 429, 72 S. Ct. 394, 96 L. Ed. 475 (1952):

> "No rites, no ceremony, no doctrinal teaching; just a brief moment with eternity."

The fact that the concept here presented may be a complex and elusive one does not detract from its essential validity. Mr. Justice Frankfurter, dissenting in *West Virginia State Board of Education v. Barnette*, *supra*, touched upon the subject of bible reading in the public schools. He noted, *inter alia*, with apparent approval, that (319 U.S. at 659):

> ". . . The requirement of Bible-reading has been justified by various state courts as an appropriate

means of *inculcating ethical precepts* . . ." (Emphasis added.)

In a letter to the Editor of the Daily Record, Baltimore, Maryland (set forth in full in the Appendix to this brief), Dr. George B. Brain, Superintendent of the Baltimore Public Schools, commented on the extremely salutary effect which the opening exercises as currently practiced in the Baltimore City Public Schools have upon the attitudes of the students from a disciplinary and behavioral standpoint.

The public school system bears a heavy burden in discharging its responsibilities in the training, development and education of each successive generation. The right to utilize the traditional mainsprings of moral and inspirational value here in question, should not be denied to the State legislative power. Leaving aside for the moment issues of coercion or compulsion upon the individual who may exercise his right to be excused, we respectfully submit that there is no sufficient encroachment or impingement in the instant case to abridge the Establishment Clause.

(c) *The Establishment Clause Principles as Applied to the Opening Exercises In Question.*

The application of the principles enunciated by this Court to the challenged exercises here in issue clearly reflect that there is no abridgement of the Church-State "barrier".

The oft-quoted *Everson* dictum, *supra*, is not abridged. The traditional use of the challenged opening exercises has not "set up a church", nor has it operated so as to "aid one religion, aid all religions, or prefer one religion over another". To the contrary, as noted above, the dominant

purpose and effect of these exercises is not to aid or foster a religion, or religiousness in general, but rather to utilize these works which have transcended their religious origins, so as to inculcate moral and ethical precepts of a sobering and inspirational nature. The public school does not aid religion here.

Furthermore, this is not the type of close Church-State workings which the Court found objectionable in *McCollum*. There, actual instruction in religious dogma took place on public school property. Numerous sectarian groups were given the aid of the State's public school system and machinery. The instant case does not begin to approach such an intimate degree of Church-State interrelationship. There are no religious instructors on school property here. This is not the teaching of a sectarian religion in a public school on school time or at public expense. Clearly, the Establishment Clause does not contemplate the prohibition of a use of religious materials for a purpose and goal which is fundamentally non-religious and non-sectarian in nature.

Employing the same reasoning, we contend that there is no infraction of the view that:

> "Government may not . . . blend secular and sectarian education . . ." *Zorach v. Clauson*, *supra*, 343 U.S. at 314.

Furthermore, to the extent the *McCollom* decision and related cases were influenced by the use of tax supported facilities for prohibited purposes, such a factor is *de minimis* in the case at hand. It plainly cannot be maintained here "that the brief interruption in the day's schooling caused by compliance with the statute adds cost to the school expenses or varies by more than an incomputable

scintilla the economy of the day's work." *Doremus v. Board of Education*, *supra*, 75 A. 2d at 882.

Despite the Petitioners' contention, we maintain that *Torcaso v. Watkins*, *supra*, poses no problem here with respect to the prohibitions of the Establishment Clause. *Torcaso*, like *Barnette*, presented questions related to matters of compulsion or coercion, which are discussed and reviewed, *infra*, in an analysis of the Free Exercise Clause.

It is, of course, the case of *Engel v. Vitale*, 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601 (1962), which presents the most directly applicable Establishment problems bearing upon the case at bar. Putting aside for the moment those aspects of that decision which deal with matters of compulsion or coercion, we respectfully submit that *Engel* held only that "... it is no part of the business of government to *compose official prayers* for any group of the American people to recite as a part of a religious program carried on by government." 370 U.S. at 425. (Emphasis added.)

The Court's opinion thus reflects that it is the *degree* of Church-State impingement which is the decisive factor. In *Engel*, the hand of the state was extended directly into the religious sphere via composition of an official prayer. It is the element of official composition which breached the barrier. This governing thought is shown again in the *Engel* opinion when the Court states, at 435:

> "... each separate government in this country should stay out of the business of writing or sanctioning official prayers. ..."

The Court thus reflected its concern with and disapproval of that degree of Church-State contact which would permit a state official either to compose a prayer for such prohibited use, or to select a prayer composed by another for the same purpose. We submit that when the Court in *Engel* referred to "writing or *sanctioning* official prayers",

it was concerned with and was directing its attention to the sort of direct state intervention presented when a state official either composes, or selects from the works of another, a modern prayer.

Plainly, had the Court held otherwise, any governmental agency would have been free to compose or select a prayer suited to its own taste and views — a practice which by nature would have been always susceptible to slanting or emphasis in a sectarian, racial or denominational fashion. This Court would have then found itself in the position of a board of censors for every prayer which might be officially composed or selected. (Compare Mr. Justice Frankfurter's concurring opinion in *McCollum*, 333 U.S. at 212-213, as quoted *supra*, pp. 8-9.)

The Court in *Engel* summarized its position thus (370 U.S. at 430):

> "Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity."

We respectfully maintain that none of the foregoing considerations are presented in the case at bar. Nowhere do we find the State's hand in the composition of a prayer. The School Board's designation of the use of the Lord's Prayer can hardly be compared with the composition or selection of the Regents' Prayer. If the selection of the Lord's Prayer constitutes "sanctioning" within the meaning of the Court's opinion, it cannot in any case be construed as the sanctioning of an "official prayer". As explored in

detail above, while the use of the Lord's Prayer or the Bible is undeniably the use of materials which are religious in nature by dint of their origin and framework, they are not used in our opening exercises as an "official prayer", but rather as a vehicle whereby the desired level of moral, ethical and inspirational uplifting can be attained, and with which our children may properly begin the sober work of the school day.

The Regents' prayer, on the other hand, could not possibly hope to achieve the status of the Lord's Prayer or the Bible. It did not — it could not — escape its limitations as an unadorned religious exercise, and thus could not avoid conflict with the Church-State barrier imposed by the Establishment Clause. It remained, by its very nature, merely a prayer — the handiwork of state officials endeavoring to compose a non-denominational, non-sectarian supplication for the blessings of the Almighty. On this account, it was stricken:

> "There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is 'nondenominational' and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral, nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment." 370 U.S. at 430.

On the other hand, the Lord's Prayer and the Bible stand on a far different footing. In our view, their use in the schools in opening exercises does not "officially establish the religious beliefs" embodied therein. Unlike the Regents' prayer, they represent far more than mere religious exercise. Their passages have come to represent, over the centuries, perhaps the finest distillations of moral values for the uplifting and inspirational edification of young and old alike. The manner in which they are used in the challenged exercises far surpasses that of a mere "solemn avowal of divine faith and supplication for the blessings of the Almighty."

There is a majestic quality to the Lord's Prayer and to the Bible. Whether child or adult, atheist or agnostic, Buddhist or Jew, there is an almost indefinable quality of inspirational appeal inherent in these works which captures the spirit and imagination. Their works rarely fail to produce an effect of wonder; often of awe. There is a sobering effect, which is comforting, and yet at the same time, inspiring.

It is the sum total of these effects which is sought to be utilized in the challenged opening exercises — not a "governmentally sponsored religious activity", not an "official prayer", but a utilization of the fundamental moral value implicit in these materials which, aided by their rich heritage and tradition, serve to play a role which far surpasses the basic elements of religiousness from which the works themselves stem.

Is the use of these established mainsprings of moral and ethical value to be denied to our public educators? The task of educating, training and developing our young is extremely difficult in this modern day and age. Our public school system should not be deprived of the ability to be-

gin the school day with a valuable, well-established and traditional adjunct in the development in our youth of those qualities of character and behavior which rank high in our society.

The elements of religiousness implicit in the present-day use of these materials in the schools' opening exercises, are not of such a nature, in quality or in quantity, in purpose or in effect, as to produce an abridgement of the principles of the Establishment Clause.

It is respectfully submitted that the opening exercises in issue have not attained such a degree of Church-State contact to be deemed a violation of the Establishment Clause.

POINT II.

The Protections Afforded Freedom of Belief by the Free Exercise Clause of the First Amendment Are Not Abridged by the Opening Exercises In Question.

The Free Exercise Clause imposes prohibitions and affords protections of a sort different from those of the Establishment Clause. If the latter defines and limits the extent or degree of constitutionally permitted interrelationship between Church and State, the former may be said to deal with the right of the individual to be free from elements of influence, coercion and compulsion in his choice of belief and worship.

> "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." *Engel v. Vitale*, 370 U.S. at 430.

In short, under the broad interpretation to be accorded the Establishment Clause, its protections are abridged whenever there is an "establishment" in the broad sense, regardless of the presence or absence of elements of coercion or compulsion upon the "nonobserving individual". The Establishment Clause thus comes "first", in that if it is abridged, there is no need to go further to determine whether or not the individual's freedom of belief or religion has been violated.

We submit that the considerations underlying the protections afforded by these two clauses must be kept separate and apart to permit proper analysis. Otherwise, the interplay between these conflicting and yet complementing constitutional spheres, can, in our view, easily lead to an oversimplification of the issues presented, or worse, to an overlay of one set of principles upon another which may tend to produce an erroneous result.

The Free Exercise Clause extends its protections beyond the usual First Amendment liberties of belief and worship, and guards against several types or forms of compulsion or coercion which are alleged to bear upon the instant case. Again, we submit that each must be subjected to separate analysis.

(a) *The so-called pressures generated by the school machinery...*

The first type of coercion or compulsion is that which survived challenge in *Zorach*, but was deemed an unconstitutional abridgement of the Free Exercise Clause in *McCollum*. Thus, in *Zorach*, 343 U.S. at 311

> "There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present

> record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented."

And in Mr. Justice Frankfurter's concurring opinion in *McCollum*, 333 U.S. at 227:

> ". . . The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. . . . The law of imitation operates, and nonconformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend."

In short, the Court in the above cases was faced with elements of compulsion which involved the use of school system facilities to channel or influence pupils toward the activity in question — a type of subtle pressure generated by the very workings of the educational machinery. In *McCollum*, this form of coercion or compulsion undoubtedly played a significant part in the decision. In *Zorach*, the Court found no such elements of coercion (but see Mr Justice Black's dissenting opinion).

It is our contention that this form or type of compulsion if any there be, goes more to the Establishment Clause than to the Free Exercise Clause. The essence of the *McCollum* brand of compulsion is that the State machinery is utilized to encourage or channel students toward a program *which is prohibited by the Establishment Clause*. In this manner, it begs the question.

That is, if the challenged activity offends the Church-State barrier imposed by the Establishment Clause, as in *McCollum*, then obviously, efforts which direct or apply

pressure upon the pupils to participate in this activity are equally offensive. But, if the requirements of the Establishment Clause have been satisfied, if the prohibited degree of Church-State inter-workings has not been attained, then any such means of so-called compulsion operates only to encourage or direct a pupil to *a constitutionally permitted activity*. Such influences must therefore be constitutional themselves. The pressures upon the child, if any be found to exist, are no more objectionable than the pressures of the compulsory school attendance requirement itself.

We accordingly maintain that if the challenged exercises have survived the tests and prohibitions of the Establishment Clause, then such factors of compulsion cannot serve to abridge the Free Exercise Clause. It is only when the activity in question is a prohibited one that the safeguards of the Free Exercise Clause are equally offended by elements of pressure and coercion toward the already offending activity. And in such instances, the added abridgement of the Free Exercise Clause is unnecessary to the result.

The one test must be separated from the other. If an activity survives the first, it must inevitably survive the other.

It is our contention that the opening exercises conducted in the Baltimore public schools do not offend the prohibitions and safeguards of the Establishment Clause. We have submitted that these exercises are utilized as an inspirational device to inculcate precepts of moral and ethical value in a salutary atmosphere of sobriety. Thus, they transcend their religious origins, and do not embrace sufficient elements of religiousness to come within the prohibited degree of Church-State inter-relationship. If this

be so, as we steadfastly maintain it is, then any elements of compulsion inherent in the school machinery which may influence the student to attend the opening exercises must be equally free of constitutional taint. If the challenged activity itself is a constitutional one, efforts to influence or persuade the child to attend are no more objectionable than like efforts to induce a child to attend a class in mathematics or music or Greek.

We maintain first that, as in *Zorach*, this form or brand of alleged compulsion is non-existent in the case at hand. It is not established, other than perhaps by way of conclusory allegation, that "any one or more teachers . . . (are) . . . using their office to persuade or force students . . ." *Zorach v. Clauson*, 343 U.S. 306, at 311. But even if it were clearly shown that the workings of the school machinery operated to produce such elements of pressure upon students to attend the exercises in question, they would nevertheless remain unobjectionable. Any such pressure exacted, of the type or form here in question, would be toward an activity deemed permissible by all of the principles and tenets of the Establishment Clause.

(b) *The Barnette brand of compulsion*

There is, however, another form of compulsion or coercion which *does* constitute an abridgement of the Free Exercise Clause, even though the program or activity in question may not encroach upon the Church-State barrier erected by the Establishment Clause. The case of *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1628 (1943), provides an excellent illustration. The Court there held unconstitutional the compulsory element of a flag salute and pledge, on the ground that it invaded the "sphere of intellect and spirit which it is the purpose of the First Amendment to our

Constitution to reserve from all official control". 319 U.S. 624, at 642. The decision did not proceed solely upon grounds related to the infringement of the religious beliefs of the Jehovah's Witnesses:

> "Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held. While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual." 319 U.S. at 634-635.

Obviously, the flag salute exercise did not run afoul of the Establishment Clause; the Church-State barrier clearly was not in issue. Rather, the exercise was held unconstitutional as an abridgement of the freedom of belief guaranteed by the Free Exercise Clause — despite the fact that no establishment problem was presented. In short, the practice was held to offend the sensibilities and scruples — religious or otherwise — of the pupils upon whom the coercion operated. It was thus the *compulsory* nature of the obligation which caused its downfall. The refusal of the state authorities to excuse or exempt those who protested rendered this brand of coercion or compulsion unconstitutional. Such lack of provision for excuse or exemption is the key element in this form of compulsion. Had the state granted such a right, the practice would have been upheld. (In fact, this is the very result of the Court's decision.)

In this area of compulsion, then, where the activity involved does not abridge the Establishment Clause, but is challenged only on Free Exercise grounds, the right to be excused from the activity is sufficient protection. The only unconstitutional aspect which may exist is that of the

compulsory requirement, and this is obviously remedied by the granting of a right of exemption.

Therefore, we submit, it continues to be the case that if the challenged activity survives the tests imposed by the Establishment Clause, it will also survive the requisites of the Free Exercise Clause — so long as the right to be excused is provided.

The form or type of compulsion present in *Barnette* is non-existent in the instant case. Like the first classification of compulsion (the *McCollum* brand, above), it must be rejected as a factor here.

(c) *The Torcaso brand of compulsion.*

Torcaso v. Watkins, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982 (1961), held unconstitutional the prerequisite of a declaration of belief in God as a test for public office. While this decision may be thought by some to be predicated in part on Establishment principles, the true criteria in the case would appear to be the violation of the protections afforded by the Free Exercise Clause:

> "This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him." *Id.*, 367 U.S. at 496.

The *Torcaso* brand of compulsion, then, is a very direct one. The State in effect directs: "Say that you believe as the State says you should believe, or you will be deprived of the reward". The compulsion to conform in belief is plain and evident.

The *Torcaso* brand of compulsion is not present in the instant case. The opening exercises in question do not invade "the appellant's freedom of belief and religion". *The Torcaso form of compulsion is directly related to the at-*

tainment or deprivation of some goal or incentive. Torcaso imposed a religious oath as a requirement to state office. The present case, on the other hand, involves an exercise which transcends mere religiousness and does not make it a requirement to any set privilege or goal. The State here does not say: "Attend and participate in this practice, or you will be deprived of a given privilege". The student is not required to attend, or if he does attend, to participate. If he absents himself, he forfeits nothing.

Accordingly, it is respectfully submitted that *Torcaso* is clearly distinguishable from the present case, and its brand of compulsion has no application here.

(d) *Disapproval and "loss of caste"; professing a belief or disbelief.*

Petitioners nevertheless maintain that the right to be excused from the opening exercises is an inadequate safeguard. They invoke in support of that contention still another category of alleged compulsion. Their contentions here take two closely related forms:

(1) The affirmative action which must be taken by or on behalf of a student to absent himself from the opening exercises, is equivalent to requiring him to "profess a belief or disbelief in religion".

(2) Subtle or outspoken disapproval from teachers and other students, as a result of the student having elected to absent himself, operates as a form of coercion to conform.

It is submitted that these closely related factors must be analyzed separately and apart from the other forms of compulsion reviewed above, lest the respective elements become improperly entwined and confused:

"The coercive or compulsive power of the State is exercised at least to the extent of requiring pupils to attend school and it requires affirmative action to exempt them from participation in these religious exercises.

* * * * * *

"Despite the provisions for excuse from attending these religious exercises, two further questions relating to coercion . . . still remain. One is whether or not there is coercion upon the individual student by reason of his incurring suspicions and losing caste with his fellows, as alleged in the petition. The other is whether or not there is compulsion upon the student or his parent requesting that he be excused, or upon both, to profess disbelief in any religion." Chief Judge Brune, dissenting below, 228 Md. at 258-259.

It is submitted that when each element of such alleged coercion or compulsion is sifted out of the composite whole in which it is found, and exposed to separate analysis, it will be seen that no constitutional safeguards have been abridged.

Obviously, as argued, a student cannot be excused from the activity in question without affirmative action. Whether he need bring a note from home, or need merely walk out of the room, he obviously must do something. But this does not mean that the right to be excused affords inadequate protection. As analyzed above in our discussion of the *Barnette* and *Torcaso* forms of compulsion, the proper role of the privilege to be excused is as an escape valve for those whose scruples or beliefs would be offended by an activity which is deemed permissible by the Establishment Clause. In this role and for this purpose, it is sufficient.

It might even be argued here with considerable vigor that if the nature of the activity in question is a permissible

one from the standpoint of the Establishment Clause, then there would appear little reason why participation or at least attendance by everyone could *not* be required. See, for example, Mr. Justice Frankfurter's dissenting opinion in *Barnette, supra.*

However, we live in an age in which responsible government is acutely aware of and sensitive to the conscientious scruples and sensibilities of minority groups — and properly so. It is for this reason that the Court, in *Barnette*, even where the activity in question was a proper one to be conducted, held unconstitutional the attempts to impose participation upon those who felt their freedom of belief was thus invaded.

For this reason, the Rule in issue grants a right to be excused and to be exempted from what we maintain is a permissible activity. Any individual whose feelings, scruples, or other tenets of belief might be offended by the practice in question, may be spared such experience, if he so chooses. Such an escape valve is sufficient and adequate.

This far, the State goes. This much protection is afforded. *No more should be required.* If the principles of the Establishment Clause are satisfied, the Free Exercise Clause may not and should not be invoked so as to spare the dissenter's sensibilities by eliminating the activity in question.

Our point here may be put thusly: the dissenter, if offended, can walk away. But he cannot ask that everyone else walk away from him. By way of analogy, if the noise and pageantry of a parade is offensive, one may refuse to watch or hear it. But he cannot rightfully petition to have the parade cancelled.

Petitioners further contend that the practice in question discriminates against them. But in reality the relief they

ask would, in fact, create a kind of "reverse discrimination". If, as we maintain, those persons whose scruples or sensibilities may be offended by the exercises are protected in their constitutional privileges by virtue of the right to be excused, then it inevitably must follow that they, in turn, have no right to go one step further and convert their right of protection into an affirmative weapon. This would convert what was intended as a shield into a sword.

We agree, of course, that the First Amendment protects the non-believer with the same force as it protects the believer. But we submit that it was never intended that such right of protection be extended to grant a preference to either, and this is precisely what Petitioners ask.

Mr. Justice Douglas expressed this concept pointedly in his dissenting opinion in *McGowan v. Maryland*, 366 U.S. 420, 563, 81 S. Ct. 1101, 6 L. Ed. 2d 393 (1961), in defining the meaning of the command of the First Amendment:

> ". . . This necessarily means, *first*, that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others; *second*, that no one shall be interfered with by government for practicing the religion of his choice; *third*, that the State may not require anyone to practice a religion or even any religion; and *fourth*, *that the State cannot compel one so to conduct himself as not to offend the religious scruples of another.*" (Emphasis added.)

As demonstrated above, the Respondents respectfully submit that they have met the first three tests. They now urge that the Petitioners be held to meet the fourth.

Petitioners urge that subtle but coercive pressures will be generated by the disapproval of teachers and pupils. The allegation is purely a conclusive one; there is no aver-

ment substantiating in any manner why or how such disapproval will take place. We also note that Mr. Justice Douglas in his concurring opinion in *Engel* found no such element of compulsion or coercion present.

But even if the issue be assumed correct, *arguendo*, the answer is plainly *not* to abolish the opening exercises. The disapproval of others is always the risk and burden of the nonconformist. He is protected in his choice to dissent by virtue of the right to be excused. But he cannot ask that the source of disapproval or of the alleged "factors of compulsion" be eliminated so that he will be spared the burden of any disapproval. This is, by choice, the dissenter's problem.

As was the case with the Jehovah's Witnesses in *Barnette*, the First Amendment tells the dissenter or nonconformist; Dissent if you wish: no group, no majority, can compel you to do as they do. But, by the same token, you cannot compel any such group to eradicate its practices to suit you. To do so would be to prefer you over those from whom you dissent. Merely because you must take affirmative action to remove yourself from the offending source, or because your exercise of that right may incur the disapproval or dislike of those who do not feel as you do, you cannot ask those others to stop their desired activity.

It makes no difference, we submit, that the acting group or body is the State or School Board (provided always, of course, that the activity does not abridge the Establishment Clause). It also makes no difference that the sensibilities and feelings of children are involved. The First Amendment affords no different protection to the young dissenter than it does to the old. The umbrella of protection against coercive factors (if any such factors be stab-

lished) does not vary with the age of the non-conformist to be protected. Parents who train their children in their own image must realize that their children will have to bear the same possible burden of disapproval as they bear. Adult or child, the conviction of the dissenter must, of necessity, be sufficiently strong to permit him to effectuate his dissent, and to bear the disapproval of others who may disagree with him.

In a country of many and varied groups and beliefs, a person may choose to attend the opening exercises, or to excuse himself, for whatever matter of reason, faith or private creed he chooses to make the grounds of such choice. He need not announce the underlying choice of faith, creed or belief which thus motivates him, unless he so wishes. He need merely absent himself. This is not too much to ask. This is not a requirement to "profess a belief or disbelief". It is simply the step of the individual who chooses to walk away. Petitioners cannot by the use of semantics convert their exercise of a First Amendment privilege into an element of coercion.

By virtue of the same reasoning, we contend there is no merit to Petitioners' argument regarding "religious discrimination" in the classroom. Petitioners invoke the case of *Brown v. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954), and contend that the opening exercises will generate feelings of inferiority and other harmful social and psychological effects comparable to those caused by racial discrimination, as noted by this Court in the segregation cases.

We reply, firstly, that not only is there no discrimination present, but that the nature of the choice made by those who elect to absent themselves is not, in essence, a religious one. As analyzed at length aboye, the exercises

themselves transcend their religious origins and framework and are used for a purpose and effect far surpassing mere religiousness. Furthermore, as also noted above, one may choose to absent himself for whatever reason or motive of faith, creed or belief he chooses, religious or otherwise, expressed or unexpressed.

Secondly, all students are treated equally in their right to attend or not to attend the exercises. The right to be excused is the exercise of a valuable privilege accorded by the protections of the First Amendment; it is not a divisive means whereby the State discriminates among groups. No justifiable comparison can be made here between the Negro children who had no choice but to submit to segregated and inherently unequal school facilities, and the children in our public schools who may by choice be excused from opening exercises.

It is accordingly submitted that equal protection clause considerations are wholly inapplicable here.

In summary, then, Respondents respectfully submit that there is no element of coercion or compulsion which gives rise to an abridgment of the protections afforded freedom of belief by the Free Exercise Clause of the First Amendment.

POINT III.

A Decision Prohibiting the Reading of the Bible and the Recital of the Lord's Prayer In Opening Exercises in the Public Schools Will Lead Inevitably to the Total Elimination of All Forms of Church-State Contact, Including References To God, From All Public Works and Institutions.

As is aptly noted in Petitioners' brief, much concern has been evidenced in many quarters regarding the ultimate consequences of the Court's decision in *Engel v.*

Vitale, supra, ranging from fear for the safety of ceremonial invocations in courts, state legislatures and Congress, to alarm regarding the use of the motto "In God We Trust" on our coins and currency.

Attempts have been made to allay much of the early misunderstanding which followed that decision. And yet it is the Respondents' earnest belief and contention that if this Court fails to find that the challenged opening exercises are within the permitted range of Church-State interrelationship, the inevitable consequence will be continued litigation demanding and leading to the elimination from our public works and institutions of *all* forms of Church-State contact which bear the slightest connotations of religiousness.

The range of instances and cases which can be embraced by an extension of the Church-State barrier is extremely broad:

> "The practices of the federal government offer many examples of this kind of aid by the state to religion. The Congress of the United States has a chaplain for each House who daily invokes divine blessings and guidance for the proceedings. The armed forces have commissioned chaplains from early days. They conduct the public services in accordance with the liturgical requirements of their respective faiths, ashore and afloat, employing for the purpose property belonging to the United States and dedicated to the services of religion. Under the Servicemen's Readjustment Act of 1944, eligible veterans may receive training at government expense for the ministry in denominational schools." Mr. Justice Reed, dissenting in *McCollum v. Board of Education, supra*, 333 U.S. at 253-254.

Perhaps the most inclusive list of illustrations is set forth in footnote 1 to Mr. Justice Douglas' concurring opinion in *Engel v. Vitale, supra*, 370 U.S. at 437:

"1. 'There are many "aids" to religion in this country at all levels of government. To mention but a few at the federal level, one might begin by observing that the very First Congress which wrote the First Amendment provided for chaplains in both Houses and in the armed services. There is compulsory chapel at the service academies, and religious services are held in federal hospitals and prisons. The President issues religious proclamations. The Bible is used for the administration of oaths. N.Y.A. and W.P.A. funds were available to parochial schools during the depression. Veterans receiving money under the "G.I." Bill of 1944 could attend denominational schools, to which payments were made directly by the government. During World War II, federal money was contributed to denominational schools for the training of nurses. The benefits of the National School Lunch Act are available to students in private as well at public schools. The Hospital Survey and Construction Act of 1946 specifically made money available to non-public hospitals. The slogan "In God We Trust" is used by the Treasury Department, and Congress recently added God to the pledge of allegiance. There is Bible-reading in the schools of the District of Columbia, and religious instruction is given in the District's National Training School for Boys. Religious organizations are exempt from the federal income tax and are granted postal privileges. Up to defined limits — 15 per cent of the adjusted gross income of individuals and 5 per cent of the net income of corporations — contributions to religious organizations are deductible for federal income tax purposes. There are limits to the deductibility of gifts and bequests to religious institutions made under the federal gift and estate tax laws. This list of federal "aids" could easily be expanded, and of course there is a long list in each state.' Fellman, the Limits of Freedom (1959), pp. 40-41."

A more familiar expression of the extremes here involved is set forth in the lower court opinion in the case at bar by Judge Prendergast (at R. 17):

"Any reference to the Declaration of Independence would be prohibited because it concludes with the historic words of the signers, * * * with a firm reliance on the protection of Divine Providence we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.' Any mention of Lincoln's Gettysburg Address would be anathema because in it the Great Emancipator prayed that 'this nation, under God, shall have a new birth of Freedom.' It is even possible that United States currency would not be accepted in school cafeterias because every bill and coin contains the familiar inscription, IN GOD WE TRUST."

In setting forth once again the extended list of illustrations which is pertinent to this point, we are not unaware of the numerous occasions upon which this approach has been utilized, nor of the many responsible rebuttals which can be offered to the contentions thus posed. But:

"I am not borrowing trouble by adumbrating these issues nor am I parading horrible examples of the consequences of today's decision. I am aware that we must decide the case before us and not some other case. But that does not mean that a case is dissociated from the past and unrelated to the future. We must decide this case with due regard for what went before and no less regard for what may come after." Mr. Justice Frankfurter, dissenting in *West Virginia State Board of Education v. Barnette*, *supra*, 319 U.S. at 660-661.

Nor are we unaware that in *Engel* at footnote 21 of the majority opinion, the Court endeavored to anticipate and to meet, to some extent, the force of the "parade of horribles", by saying (370 U.S. at 435):

"There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which

contain references to the Deity or by singing officially espoused anthems which include the composer's profession of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance."

However, we respectfully maintain that the very serious considerations presented by the foregoing categorization of possible consequences cannot be lightly or easily dismissed. In the range or spectrum of varying factual situations and instances, it is urged that the line be drawn *here*, and not beyond. Beyond the Lord's Prayer and Bible reading, if prohibited, the distinctions become extremely tenuous. If these opening exercises are deemed to bear sufficient elements of religiousness to fall within the proscribed Church-State area, it will become increasingly difficult to maintain that any other form of Church-State contact does not bear equally sufficient aspects of religiousness. Distinctions can undoubtedly be made, but the force and logic behind them become seriously hampered and weakened the further one progresses along the span or range of possible instances. Each time the Court condemns a form of activity bearing somewhat less "quanta" of religiousness than its predecessor, it becomes that much more difficult not to encompass with the same reasoning the next activity on the scale of religiousness.

We note with interest Justice Douglas' concurring opinion in *Engel*. After setting forth the foregoing quotation from Fellman at footnote 1 of his opinion, he then proceeds to say: "Nevertheless, I think it is an unconstitutional undertaking whatever form it takes". 370 U.S. at 437. We contrast this statement with many of the expressions in *Zorach*.

As can thus readily be seen, it is not difficult to embrace *all* forms of Church-State aid or contact within whatever rationale or approach is utilized in the case at hand. Regardless of present intentions concerning distinctions which can be made at some future date, the fact which cannot be disregarded is that views may change and become altered; the shifting composition of views which today may draw the line at one indicated point, may tomorrow extend that line to encompass situations not presently thought to be forbidden.

Irrespective of the analysis and rationale employed in the first two points of our argument, it is for the further and additional reasons advanced here that we urge that the line be drawn at this juncture. The only sure manner in which to halt the gradual and increasing erosion of a vulnerable area, is to firmly mark the dividing line at that point which is the most likely bulwark from a legal and logical standpoint.

Those persons who feel their interests will be advanced by the elimination of religious materials in opening exercises in the public schools will not stop here. Already proceedings have been instituted before the Commissioner of the State Department of Education of New York, challenging the use in school opening exercises of the Pledge of Allegiance to the Flag, the final stanza of the hymn "America", and the Declaration of Independence. *In the Matter of Jurgen Worthing, et al. v. Levittown School District*, filed September 25, 1962. Suffice it to say that the challenges are made on familiar grounds.

The door has been opened. Today, "patriotic or ceremonial occasions" may be said to bear little resemblance to the religious exercise involved in *Engel*, but as each successive case is presented, one step at a time, the re-

semblance becomes greater. Perspective on a graduated scale of values can easily become foreshortened.

Even classes in comparative religion would be suspect. Emphasis by the individual teacher or professor can be placed on the virtues of one religion to the exclusion or detriment of another. Will this Court be the watchdog over every form and expression of religiousness in our public life?

If sectarianism or religiousness is made the test, the same governing principle can be extended to every manifestation of religion and recognition of God in public life. Schools are not the only public institutions, and the nonconformist can find himself offended in any quarter. If Bible reading unconstitutionally offends the Buddhist or the atheist in opening exercises in the public schools, why should not a like result obtain if the same people are equally offended by the invocation which opens sessions of Congress, or by the traditional court crier, or by the reference to the Deity on our currency? Once the opening exercises at bar are condemned, the gap is dangerously narrowed.

The same inspirational appeal which is utilized in the recitation of the Lord's Prayer and readings from the Bible, is evoked in similar fashion by the references to the Deity in our National Anthem, in the Pledge of Allegiance to the Flag, in our historic national documents. If the use of the former is prohibited by reason of their religiousness, then the prohibition of the use of the latter will inevitably follow.

The argument which we make here has been made before. But it assumes renewed significance in view of the increased attempts, after *Engel*, to eradicate every sem-

blance of religiousness in our public life. We commend it anew to the Court's earnest consideration.

Point IV.

The Traditional Use of the Lord's Prayer and the Bible in Opening Exercises in our Public Schools Has Become Inextricably Entwined With Other Basic Components of our National Heritage.

After the last court opinion has been cited, and the final legal distinction has been drawn, there still remains a somewhat intangible factor which urges with equal force and dignity that the practice here challenged should not be condemned. Elusive of analysis, this factor would appear to be a delicate combination of those elements of tradition, patriotism, and love of country which have come to be so closely associated with the inspirational appeal evoked and utilized by the religious materials in issue.

Like the references to the Deity in our historic national documents, the use of these materials in opening exercises in the public schools has become a vital and significant thread in the fabric of our rich national heritage, through long and traditional usage. Like the "Sunday closing laws" in *McGowan*, the traditional use of these exercises has surpassed its religious beginnings and has taken its place as a definite part of our national heritage. The thread cannot be easily severed without damage to the whole fabric from which it is drawn.

It has been said that too great a reliance has been placed on the oft-quoted observation by Mr. Justice Douglas in *Zorach* that "We are a religious people . . ." *Id.* 343 U.S. at 313. And yet it cannot be denied that innumerable facets of our public and private life are saturated with religious influences. Our public institutions in Maryland are steeped

in religious traditions. To begin here the slow but inevitable dissection of these influences and traditions from the public sphere can only result in substantial harm to those tenets of our national heritage which have come to mean so much to so many.

We recognize that the argument which we make here may rest upon factors of a somewhat intangible nature when compared to those previously advanced. But the point is an equally real one, and cannot be ignored. It, too, must be weighed in the balance.

CONCLUSION

The use of the Lord's Prayer and passages from the Bible in opening exercises in the public school does not constitute a violation of either the Establishment Clause or the Free Exercise Clause of the First Amendment to the Constitution, as made applicable to the states by the Fourteenth Amendment. The Respondents respectfully request that the decision of the Court of Appeals of Maryland be affirmed.

Respectfully submitted,

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APPENDIX

Letter from Dr. George B. Br n to the Editor of The Daily Record, Baltimore, Md., issue of December 26, 1962

"Editor
THE DAILY RECORD
11-15 East Saratoga Street
Baltimore 3, Maryland

Dear Sir:

In the past few months, our office has received a number of inquiries from the general public, as well as from members of the legal profession, regarding the views of this office as to the values accruing to pupils from the opening exercises conducted each morning in the Baltimore City public school system. These inquiries have undoubtedly been prompted by the interest generated by the litigation currently before the U. S. Supreme Court attacking the practice in the Baltimore City Schools.

Without regard to the legal issues involved, this office wishes to answer the many inquiries as to our views concerning the value of these exercises in the administration of the public school system. I feel competent to comment from an educational point of view on the values which I observe as accruing to the educational program from the practice.

The School Board rule provides that each school, either collectively or in classes, shall be opened by reading without comment a chapter from the Holy Bible and or the recitation of the Lord's Prayer without comment. In addition, patriotic observances including the Pledge of Allegiance to the Flag and the singing of the Star Spangled Banner are included.

As you no doubt are aware, there has been a general trend in recent years for a great number of children from rural areas to move into the large urban centers throughout America. Oftentimes these newcomers to the city are bewildered and confused by the rules and regulations that

must be observed in a complex urban society. Generally, some of the youth have a tendency to resent any authority, and as a consequence, rebel against rule and regulation.

It has been my candid observation that the opening exercise as practiced in Baltimore City has a salutary effect on the attitudes and behavior of such youth. The acknowledgement of the existence of God as symbolized in the opening exercise establishes a discipline tone which tends to cause each individual pupil to constrain his overt acts and to consequently conform to accepted standards of behavior during his attendance at school. This is especially observable at assembly programs where pupils are congregated together in considerable numbers. While the beneficial effect of the opening exercise may be somewhat ephemeral, it is my candid observation that if no legal question was involved and I was to be asked about the advisability of continuing or discontinuing the practice purely from a disciplinary point of view, I would without question include the practice as a part of the routine opening activities of the school because of its salutary effect.

The attitude which a child brings to his classwork is highly important and it is my strong feeling that a proper attitude for respecting authority is developed through opening exercise activities as currently practiced in the Baltimore City Public Schools.

Very truly yours,

GEORGE B. BRAIN,
Superintendent."